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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANTHONY R. FIELDS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether petitioner was entrapped as a matter of law?

Whether petitioner's acquittal of the first of a series of four transactions precludes his conviction on the last three?

Whether the district court's failure to clarify the time to be looked to in determining predisposition, especially after the jury's request, was error?

Whether the sentence given petitioner who went to trial either was or appeared to be a penalty for his election to proceed to trial, such as to have a chilling effect on the exercise of constitutional rights?

TABLE OF CONTENTS

Page

Questions presented 1

Table of Contents ii

Table of Authorities iii

Opinion Below 2

Jurisdiction 2

Constitutional Provisions and Statutes 3

Statement of the Case 3

Argument 12

Conclusion 27

TABLE OF AUTHORITIES

Bollenbach v. United States,
326 U.S. 607 (1945)..... 20

Dunn v. United States,
284 U.S. 390 (1931)..... 23

Harris v. Rivera, ___ U.S. ___
(No. 81-17, Dec. 14, 1981) 23

Lopez v. United States,
373 U.S. 427 (1963)..... 12

Masciale v. United States,
356 U.S. 386 (1958) 13

North Carolina v. Pearce,
395 U.S. 711 (1969) 26

Sherman v. United States,
356 U.S. 369 (1958) 16,18

Sorrells v. United States,
287 U.S. 435 (1932) 17

United States v. Anderton,
629 F.2d 1044 (5th Cir., 1980). 22

United States v. Duff,
555 F.2d 187 (7th Cir., 1977).. 14

United States v. Rech,
589 F.2d 1025 (10th Cir., 1978) 24

United States v. Russell,
411 U.S. 423 (1973) 14

United States v. Silver,
457 F.2d 1217 (3d Cir., 1980).. 22

United States v. Stockwell,
472 F.2d 1186 (9th Cir., 1973). 26

United States v. West,
511 F.2d 1083 (3d Cir., 1975).. 19

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

ANTHONY R. FIELDS (hereinafter Petitioner), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his convictions in the instant case for knowingly acquiring and possessing food stamp coupons in a manner not authorized by law.

II.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit,___ F.2d ____, is as of yet still unreported. It is reproduced as Appendix A to this petition.

III.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 14, 1982. This petition is timely filed under Supreme Court Rule 20.1.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V

United States Constitution, Amendment VI.

18 U.S.C. 2 & 846

7 U.S.C. 2024 (b)

The constitutional and statutory provisions are reproduced as Appendix B.

STATEMENT OF THE CASE

In May of 1981, Petitioner was charged in a five-count indictment with conspiracy to violate 7 U.S.C. 2024(b) and four substantive violations of 7 U.S.C. 2024 (b) (unauthorized acquisition or possession of food stamp coupons), the four substantive counts occurring on February 18, 1981, February 26, 1981, March 26, 1981, and April 24, 1981. A co-defendant, Eugene Carter, pleaded guilty and was sentenced to 90 days incarceration. Upon the government's motion, the conspiracy count was dismissed.

The case proceeded to trial before the Honorable James E. Noland sitting with a jury. The defense was one of entrapment as to all four remaining counts. The jury returned a verdict of not guilty with respect to the first transaction (February 18, 1981) but returned guilty verdicts as to the later three transactions (February 26, 1981, March 26, 1981, and April 24, 1981). Upon the three verdicts of guilty petitioner was sentenced to two concurrent terms of three years imprisonment, and imposition of sentence on the remaining count was suspended, the petitioner being placed on probation for a period of five years to commence upon petitioner's release from prison.

Timely appeal was taken to the United States Court of Appeals for the Seventh Circuit, jurisdiction being invoked under 28 U.S.C. Sec. 1291. The Court of Appeals by

opinion filed September 14, 1982, affirmed the judgment of conviction and sentence. By appropriate orders, the mandate of the Court of Appeals was stayed pending this petition and petitioner has remained enlarged on bail.

As far as is relevant to this petition, the evidence developed at trial involves Ernest Stanford and Robyn Stewart, government agents; William Allen, a government informant who was "working off" a pending charge, Eugene Carter, the co-defendant and Anthony Fields, petitioner.

The agents testified that the government devised a scheme to sell food stamp coupons at a cut-rate price. (R.Vol.II, pp. 238, 253) By implementation of this scheme, the agents made the initial approach to petitioner on each of four occasions, induced him to acquire and possess the food

stamp coupons and then arrested him for acquiring and possessing the food stamp coupons.

The agents were involved in an investigation absolutely unrelated to petitioner when the agents through the informant Allen were introduced to the co-defendant Carter, a trafficker in weapons and narcotics. Carter indicated that he "might" know someone who would be interested in buying food stamp coupons. The agents, the informer and Carter drove to D & P Variety Store, petitioner's place of business. Carter went into the store while the others waited outside.

(Prior to this first meeting with petitioner on February 18, 1981, according to the agents, they had no information at all about petitioner, and most certainly, no information that he was involved in illicit dealings in food stamps. The agents on this

occasion, however, and each of the following ones, initiated the contact. Never did petitioner call the agents to initiate a transaction. Once, coming to petitioner's store and finding that he was not present, the agents even called around to find him to have him come to the store. Admittedly toward the end of the first transaction petitioner expressed a willingness to make future purchases and gave the agents telephone numbers where he could be reached for that purpose.)

When petitioner came outside, the agents asked if he was interested in dealing in food stamps. Petitioner, according to the agents, expressed a willingness to talk about the idea. The agents then gave petitioner their "pitch." On this date and on the following dates, according to the agents' testimony, petitioner said that he did not want to buy stamps that were "hot"

or stolen. (R.Vol.II, pp.254-56, 343-44.) Petitioner said that he did not want to get into trouble or be arrested. (R.Vol.II, p.229) On each date the agents calmed his fears. (R.Vol.II, pp. 343-4) The agents informed petitioner that Agent Stewart worked in a food stamp office and got the stamps before they were sent out. (R.Vol.II, p.250) Agent Stewart testified that petitioner, a black merchant in a poor black area, was led to believe that he had hit upon a bonanza, a get-rich-quick plan; that petitioner could safely make a lot of money because the stamps were "clean" (not stolen?) (R.Vol.II, pp. 230-31) Agent Stanford testified that he told petitioner the stamps were good, that there was no way they would give him stamps that were bad or give him a "raw deal." (R.Vol.II, p.250)

According to the agents, on two of the later dates, February 26, 1981 and April 24, 1981, in efforts to overcome petitioner's reluctance, they threatened to take their business elsewhere (R.Vol.II, p.211) and prompted him to make a hurried decision, telling him they were in a hurry and that if he wanted to buy the stamps he would have to do so right then. (R.Vol.II, p.223)

On the date of the last transaction the agents had brought a much larger amount of stamps than on previous occasions, but petitioner did not have the full amount of cash, and in perhaps a telling statement, the agent added that petitioner therefore could not "do the amount of stamps that we wanted him to do." (R.Vol.II, pp. 247-48) Petitioner was arrested at the conclusion of the fourth transaction.

In short, the agents, according to their own testimony, pursuant to a government formulated plan, made the initial contact with petitioner, about whom they had no information that he was dealing in illicit food stamps, and by representations leading him to believe he could make large amounts of money, and at the same time overcoming his hesitance by assuring him that the stamps were not "hot" and that he could not get into trouble by purchasing them, induced him to acquire and possess the stamps so that they could arrest him for doing so.

At the conclusion of the evidence the district court, after refusing defense instructions relative to entrapment and predisposition, gave certain pattern jury instructions of the Seventh Circuit Court of Appeals on the entrapment defense. The jury during its deliberations sent out a note requesting a legal dictionary. Later, at

approximately midnight, after 13 hours of deliberation, the jury sent out a note requesting clarification of the operative time period on the question of predisposition, "Does prior intent or predisposition mean prior to the proposal or prior to the offense?" The district court during a telephone conference call with the attorneys, not in the presence of the petitioner, decided to refer the jurors to the previously given instructions.

The jury acquitted petitioner of the first transaction, even though petitioner, having taken the witness stand to support his entrapment defense, admitted to having acquired and possessed the stamps on that date. The jury, however, returned verdicts of guilty as to the later transactions.

At the sentencing hearing it was developed that the government had made a pretrial offer to petitioner and to the co-defendant that upon pleas of guilty the government would recommend 90 days imprisonment. Carter entered a guilty plea, the government made its recommendation of 90 days, and the district court accepted that recommendation in imposing sentence on Carter. Petitioner, who exercised his right to trial, was sentenced to two concurrent terms of three years imprisonment to be followed by a period of five years probation.

V.

ARGUMENT

REASONS FOR GRANTING PETITION

1. This cause presents significant questions relative to entrapment, a subject upon which not only the various Circuits of the Courts of Appeals but even this Court has been "sharply divided." (Lopez v. United States, 373 U.S. 427, 434 (1963).) No decision of this Court has dealt with a situation where as here the government furnishes the sine qua non of an offense to one who was not previously and actually engaged in the commission of that offense. The case also presents a question of the moment in time at which the question of predisposition must be determined, the decision below appearing to be in conflict on this point with earlier decisions of this Court, and of another Circuit. Important and recurring

questions would be resolved were this Court to grant this petition.

Many cases have dealt with a defense claim that the government supplied to the accused the subject matter of the conviction. These claims are usually presented in one of two ways. In the first, the defense claims that because the defense testimony is that the material, usually narcotics, came from the government and such testimony is unrebutted, entrapment has been established as a matter of law. Generally the cases hold that the question is one for the jury despite the lack of rebuttal evidence. (Eg. Masciale v. United States, 356 U.S. 386 (1958).) In the other type of case the defense claims entitlement to an instruction requiring acquittal upon a finding that the government supplied the contraband, regardless of the defendant's predisposition to commit the particular offense. Generally

the cases hold no error in refusing such an instruction. (Eg. United States v. Duff, 551 F.2d 187 (7th Cir., 1977).)

But few are the cases such as the instant case where both the government and the defense agree that the material, the possession of which is prohibited, came from the government. In these cases the question of entrapment presents itself most clearly.

Even in these cases, this Court has held that the defense of entrapment will not be available to one who is already engaged in the commission of the offense at the time the government first approaches him, despite the fact that the government later supplies him with the contraband or its necessary ingredients. Thus, in United States v. Russell, 411 U.S. 423 (1973) the defendant's admission and other evidence of his previous manufacturing of methamphetamines as well as his concession of predisposition rendered

the entrapment defense unavailable to him.

We hope that by the foregoing discussion we have clarified the type of case presented here. We deal with one who was prosecuted for possessing that which was put into his hands by the government; one who did not first approach the government agents, but who was first approached by them with a plan of government design; one who was shown even then not to have committed the offense until the government overcame his expressed reluctance with representations of easily made gains and assurances that he could not get into trouble; one who was not shown to have previously committed the offense, and one who does not concede predisposition. Under any test of entrapment, or of a due process notion of outrageous government conduct in instigating an offense, this conviction should not stand.

Sherman v. United States, 356 U.S. 369 (1958) made clear that "ready complaisance" (we suggest, not present here) and even proof of prior convictions for the same offense (again not present here) are not sufficient to establish predisposition where the defendant is not currently involved in the commission of the same type of offense, or in "the trade" as this Court put it. (356 U.S. at 375) The Court of Appeals below, by restating the same evidentiary facts in several different ways, found "ample evidence" of predisposition in almost solely the fact that petitioner committed the offense. Certainly a defendant must admit to the commission of the offense in order to claim entrapment in the first instance , but that does not rule out entrapment where there is no showing that he was in "the trade."

Of this Court's decisions, perhaps the most similar to the instant case regarding predisposition is Sorrells v. United States, 287 U.S. 435 (1932), the seminal case on entrapment. There the agent, on the first date he met Sorrells, asked Sorrells to obtain some whiskey for him; after two refusals and some war-time reminiscences, Sorrells agreed, and left. After but a few minutes he returned with the whiskey. Despite that it was the first meeting of agent and defendant, despite the number of refusals being only two, despite the fact that it only took but a few minutes for Sorrells to obtain the whiskey, giving rise to an inference of a readily known source, and despite even testimony that Sorrells had the reputation of a "rum-runner," this Court reversed the conviction, finding Sorrells to be an otherwise innocent person whom the government was seeking to punish for an

offense the product of its own creative activity. (287 U.S. at 451) This is a most fitting description of petitioner.

2. Apparently, the jury agreed with this description to some extent, since in the face of the government's evidence and the petitioner's own admissions that he had purchased the stamps, the jury acquitted petitioner of the first transaction. Clearly, on this state of the record the acquittal involved a finding of entrapment.

The Court of Appeals below in addressing this contention stated that a finding of entrapment on the first transaction does not taint the convictions on the later transactions. Most respectfully it is suggested that this statement is directly contrary to this Court's holding in Sherman v. United States, 356 U.S. 369, 374, (1958):

> It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement.

(See also: United States v. West, 511 F.2d 1083, 1086 (3d Cir., 1975).)

3. The Court below, in further refutation of this argument suggested that the matter was one of inconsistency between verdicts which is not held to require reversal of a conviction. Were it not for an obvious problem with the district court's instructions, we might be constrained to agree.

Petitioner had offered an instruction relative to predisposition specifying that predisposition means a previous or prior

inclination or tendency to do an act. (See: Appendix C) The district court refused the instruction in favor of pattern instructions promulgated by the Seventh Circuit Court of Appeals (See: Appendix C) which did not specify when in respect to the transactions the question of predisposition was to be determined.

Near midnight, after approximately 13 hours of continuous deliberation and after having first requested a legal dictionary, the jury sent out a note asking, "Does prior intent or predisposition mean prior to the proposal or prior to the offense?" The district court in reply referred the jury again to the previously given instructions.

Petitioner argued below and argues here that such response was error, and fell within this Court's holding in Bollenbach v. United States, 326 U.S. 607, 612-13 (1945):

An experienced trial judge should have realized that such a long wrangle in the jury room as occurred in this case would leave the jury in a state of frayed nerves and fatigued attention, with the desire to go home and escape overnight detention, particularly in view of a plain hint from the judge that a verdict ought to be forthcoming. The jury was obviously in doubt as to Bollenbach's participation in the theft of the securities in Minneapolis and their transportation to New York. The jury's questions...clearly indicated that the jurors were confused... Discharge of the jury's responsibility for drawing appropriate conclusions

> from the testimony depend on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy... A conviction ought not to rest on an equivocal direction to the jury on a basic issue.

(See also: United States v. Silver, 457 F.2d 1217 (3d Cir., 1980) and United States v. Anderton, 629 F.2d 1044 (5th Cir., 1980), both of which are entrapment cases, the latter making particular reference to the need for clarifying instructions as to terms of legal significance where the jury has made known its difficulty.)

Because of this apparent confusion on the issue of when, in relation to the transactions, predisposition is to be determined, those cases upholding inconsistent verdicts are not applicable. Dunn v. United States, 284 U.S. 390 (1931) was based upon the jury's historic power of lenity. That this was the basis for the decision was reaffirmed by this Court as late as last year in Harris v. Rivera, ___ U.S. ___, No. 81-17, December 14, 1981). Here we deal not with jury lenity, but jury confusion on a basic issue and cases on inconsistent verdicts have no application.

The Court of Appeals also on the issue of clarifying instructions sua sponte raised the issue of waiver, even though the issue was never briefed by either side. The decision below stressed that trial counsel for petitioner had agreed to the district court's response. This agreement was

reached during a conference telephone call among the trial judge and respective counsel. Petitioner was not present, nor had he personally waived the right to be present. Significant questions as to the validity of any waiver by petitioner's trial counsel outside his presence should not have been decided without the opportunity for complete briefing. (See: United States v. Rich, 589 F.2d 1025 (10th Cir., 1978), holding that a defendant's trial counsel may not waive his client's constitutional rights in ex parte meetings with the trial judge.)

4. Petitioner, and his co-defendant Carter, both received prior to trial offers from the government that in return for a plea, the government would recommend a sentence of 90 days. The district court did accept that recommendation with respect to the sentence of 90 days imposed on Carter upon his plea. Petitioner, who elected to

exercise his right to trial however, received sentences of three years imprisonment to be followed by five years probation.

The Court of Appeals, in affirming the sentence, stated that petitioner produced no evidence apart from the disparity of sentences to support a claim or even raise the inference that the heavier sentence was a penalty for pleading not guilty. (See Appendix A, p.11)

Despite this view of the court below, there is evidence to support such an inference. Both defendants were made the same offer by the government. As to the co-defendant the district court found the sentence recommendations appropriate. Certainly, the inference is plain that the district court would have imposed the same sentence with respect to petitioner.

Whether or not the sentence was a penalty for going to trial, the record

leaves unrebutted such an inference. In an analagous situation, in United States v. Stockwell, 472 F.2d 1186 (9th Cir., 1973) the Court held that the mere appearance of such a practice would have a chilling effect upon constitutional rights. The Court held that the record must affirmatively show that the heavier sentence was based solely on the facts of the case and the defendant's personal history and not as punishment for his refusal to plead guilty. (Cf. North Carolina v. Pearce, 395 U.S. 711 (1969).

VII.

CONCLUSION

Petitioner, Anthony R. Fields, respectfully urges that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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